FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 342

MADISON L. MILLER, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALLACE MILLER,
JAS. A. LOWREY, JR.,
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Attorneys for Petitioner.

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vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Madison L. Miller, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of Madison L. Miller, Jr., Appellant, *vs.* United States of America, Appellee, on June 8, 1934, 71 F. (2d) 361, affirming the judgment of the United States District Court for the Middle District of Georgia.

I.

The Case.

Madison L. Miller, Jr., filed suit against the United States in the United States District Court for the Middle District of Georgia to recover total permanent disability

benefits of $57.50 per month from October 26, 1918, payable under a contract of yearly renewable term insurance issued to him through the Bureau of War Risk Insurance about January 22, 1918, because of injuries received by him in a troop train wreck in France (R. 11).

Defendant admitted issuance of the policy, the payment of premiums continuing the insurance in force to May 31, 1919, the due filing of the claim, and that a disagreement had arisen (R. 11).

The only issue made upon the trial of the case was whether or not plaintiff became totally disabled while said insurance was in force by the payment of premiums, as counsel for defendant conceded in open court that plaintiff's injuries were permanent, but contended that they did not render plaintiff totally disabled within the terms and meaning of the insurance contract and the law (R. 11).

The evidence for plaintiff and the fair inferences therefrom show:

Plaintiff's right hand was badly mangled in a train wreck on October 26, 1918. At the same time he received injuries about the face and head. Two days later his right arm was amputated above the elbow. His left eye was defective from birth, and after his injury and while in the hospital in France he discovered that he could see only the outline of large objects with his left eye. At that time he had only one-tenth vision in the left eye and no use of that eye; that its condition was then permanent and could not be corrected (R. 12, 15).

The extent of plaintiff's schooling was the third grade in high school. Prior to his enlistment he was a practical engineer, not a graduate engineer, and he could not do the engineering work for which he was trained after his injuries (R. 12-13).

Plaintiff's first job after he was discharged was given him out of sympathy and lasted only one month. He ob-

tained several other jobs after this with different employers, but in each case after a short period of employment he had to give up these jobs because of his handicaps rendering him unable to do the work required (R. 13-14).

He then tried selling stocks on a commission, and worked at this for twenty-two months, but earned during the entire time only $105. In 1931 he tried selling goods for the Fuller Brush Company and worked at this from January until May and earned only $20. He has no talent for sales jobs. During the period from April, 1919, when he was discharged from the Army, to the date of the trial, July, 1933, he earned only $405 (R. 14-15).

During the intervals between jobs plaintiff obtained and lost he tried diligently to get other employment, but could not in competition with others who had two hands and two good eyes (R. 14).

He was right-handed before his injury, and the loss of his right arm and his left eye rendered him much more seriously handicapped than if he had lost an arm and an eye on the same side (R. 13, 15).

The medical witness for plaintiff testified he knew of no gainful occupation plaintiff could follow, and that with the loss of his right arm and left eye he was totally disabled (R. 15).

Upon the conclusion of plaintiff's evidence counsel for defendant moved for a directed verdict on the following grounds:

> "(1) That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.
>
> "(2) Because it affirmatively appears from the plaintiff's evidence that the eye disability existed prior to the issuance of the War Risk Insurance sued upon, and because the remaining disability, to-wit, the loss of an arm, is not a total disability" (R. 16).

Thereupon, the trial judge stated that he would overrule the second ground of the motion for directed verdict, and that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. The verdict was so directed, and upon this verdict judgment was entered for the defendant against the plaintiff for costs (R. 17).

Upon the final judgment plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court affirmed the judgment of the District Court on June 8, 1934, and decided that subdivision 3 of Section 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473), was not applicable to war risk insurance; and that Regulation 3140 of the Veterans' Administration, providing that certain specific losses, among them the permanent loss of the use of a hand and an eye, shall be deemed total permanent disability under yearly renewable term insurance, was beyond the authority of the Director of the Veterans' Bureau, or the Administrator of Veterans' Affairs, to issue, and not binding upon the courts; and that regulations aside, the evidence did not warrant a finding of total permanent disability (R. 27, 24, 25).

II.

Questions Presented.

(1) Is subdivision 3 of Section 202 of the World War Veterans' Act, 1924, as amended (38 U. S. C. A., Sect. 473), providing that certain losses, among them the permanent loss of the use of one hand and one eye, shall be deemed to

be total permanent disability, applicable to war risk insurance?

(2) Is Regulation 3140 of the Veterans' Administration beyond the power and authority of the Director of the Veterans' Bureau (now Administrator of Veterans' Affairs) to make, and therefore not binding on the courts?

This regulation is as follows:

> "Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest."

(3) Was there any evidence upon which a verdict for petitioner might properly be found?

(4) Did not the Circuit Court of Appeals, in affirming the action of the trial court in directing the jury to return a verdict for defendant, deprive petitioner of his constitutional right of trial by jury, given him by the Seventh Amendment to the Constitution of the United States?

III.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A. Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was beyond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

IV.

Reasons for Granting Certiorari.

(1) The questions presented in this petition are of great importance because they not only vitally affect the rights of all veterans insured under war risk insurance contracts and disabled by certain losses specified in the statute (38 U. S. C. 473) and Regulation 3140, but they vitally affect the thousands of Government (converted) contracts of insurance now in force which contain provisions making the identical losses specified in the statute and Regulation 3140 total permanent disability under such contracts. If the Director of the Veterans' Bureau, or Administrator of Veterans' Affairs, had not the power and authority to make Regulation 3140, he has no power or authority to insert a similar provision in the Government (converted) contracts of insurance, or to issue Regulation 3122, identical with Regulation 3140, except it applies to United

States Government life insurance (converted insurance) rather than yearly renewable term insurance. If Regulation 3140 is invalid, similar provisions in converted policies are likewise invalid. If subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, is not applicable to war risk insurance (term insurance), it is not applicable to converted contracts of Government life insurance. The power and authority of the Director of the Veterans' Bureau, or Administrator of Veterans' Affairs, to determine the terms and conditions of converted insurance and to make regulations relative thereto are identically the same as his power and authority relative to yearly renewable term insurance.

(2) The Circuit Court of Appeals in this case has decided important questions of Federal law which have not been, but should be, settled by this Court, to-wit: The application of subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended, and the validity of Regulation 3140 of the Veterans' Administration.

These questions should be settled by this Court because they vitally affect the power and authority of the Director of Veterans' Affairs to determine and publish terms and conditions of insurance contracts providing protection against total permanent disability, and rules to govern the Veterans' Administration in determining what shall constitute total permanent disability, and because they affect the rights of thousands of persons insured by the Government through the Veterans' Bureau and the Veterans' Administration.

(3) The decision of the Circuit Court of Appeals in this case, as to the application of subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, (38 U. S. C. 473) and the validity of Regulation 3140, is in conflict with de-

cisions of the Circuit Court of Appeals for the Ninth Circuit in the following cases:

U. S. v. *Law,* 299 Fed. 61 (see page 64) Reversed by this Court on jurisdictional question (266 U. S. 494);

U. S. v. *Rasar,* 45 F. (2d) 545 (see page 548);

Sorvik v. *U. S.,* 52 F. (2d) 406 (see page 411).

The decision in the instant case as to the validity of Regulation 3140 is in conflict with the clear inferential holding of the Circuit Court of Appeals for the Sixth Circuit in the case of *United States* v. *Cole,* 45 F. (2d) 339, 340, that old Regulation 4, to the same effect as Regulation 3140, is a valid part of the insured's contract of war risk insurance.

(4) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, in that it has overturned the construction or interpretation of veteran legislation adhered to for years by those charged with the administration of such laws, during which time these laws have been repeatedly amended without Congress evidencing any disapproval of the Bureau's interpretation of Sect. 473, Title 38, U. S. Code, and similar provisions of prior laws. Likewise, Regulation 3140 is of the same import as earlier Regulation 57 of the Bureau of War Risk Insurance, issued November 26, 1920, and Regulation 4 of the Veterans' Bureau, issued September 12, 1921. Congress has shown no disapproval of these regulations while repeatedly amending the laws relative to both compensation and insurance. Applicable decisions of this Court, among many, are:

U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898;

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;

U. S. v. *John Bailey,* 9 Peters 238, 256, 11 Curtis 341, 345.

(5) The decision of the Circuit Court of Appeals on the sufficiency of the evidence and affirming the action of the trial court in directing a verdict is violative of the principles announced by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 94, and *Lumbra* v. *U. S.*, 290 U. S. 551 (Advance Opinions), and is an infringement of the constitutional right of trial by jury given by the Seventh Amendment to the Constitution of the United States.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted and its judgment reversed.

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

FLORIDA,
Dade County:

Personally appeared before the undersigned officer, authorized to administer oaths, Madison L. Miller, Jr., who, being duly sworn, deposes and says that he is petitioner in the foregoing petition for certiorari and has read the same, and that the facts stated therein are true, and that said application for certiorari is not made for the purpose of delay, but that he is advised and believes that he has meritorious reasons why he should apply for a writ of certiorari to be granted in the within stated case.

MADISON L. MILLER, JR.

Sworn to and subscribed before me, this 29th day of August, 1934.

[SEAL.]

M. E. COOPER,
Notary Public.

Notary Public, State of Florida at Large. My Commission expires Feb. 26, 1936.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The trial court filed no opinion in this case, but the judge's view of the law is shown by his statement on directing a verdict for defendant (R. 16). The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 361.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347. The judgment of the Circuit Court of Appeals to be reviewed was entered June 8, 1934 (R. 27).

III.

Statement of the Case.

We believe the statement of the case in the petition for writ of certiorari is adequate, and for the sake of brevity we are not restating it here.

IV.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A. Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was be-

yond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

V.

Summary of Argument.

(1) Subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, as amended, (38 U. S. C. 473) defining or declaring total permanent disability to include certain specific losses, among them the permanent loss of the use of a hand and an eye, is applicable to war risk insurance, as shown by the legislative, administrative and judicial history of this provision and a consideration of the entire Act. (38 U. S. C. 473 quoted in part in Appendix, pg. 29.)

(2) Regulation 3140 is within the power and authority of the Administrator of Veterans' Affairs, formerly the Director of the Veterans' Bureau, to issue, either under 38 U. S. C. 473, or independently of this section under general powers and authority conferred on the Director of the Veterans' Bureau and transferred to the Administrator.

(3) There was evidence before the jury upon which a verdict for petitioner might properly be found, and petitioner has been deprived of his constitutional right of trial by jury.

VI.

ARGUMENT.

Application of 38 U. S. C., Section 473.

The legislative, administrative and judicial history of veteran legislation, and particularly subdivision 3, Sect. 202, World War Veterans' Act, 1924, as amended (38 U. S. C. Sect. 473) shows that it was the purpose and intent of Congress that a definition of total permanent disability to include certain losses, among them the permanent loss of the use of a hand and an eye, as provided in 38 U. S. C. 473, apply to war risk insurance, or yearly renewable insurance, as well as compensation allowances.

The War Risk Insurance Act of 1917 provided for compensation under Article 3 and insurance under Article 4. Section 400 of this Act states the purpose of granting insurance is to give greater protection against death and total disability than given under the article covering compensation. (See Appendix, pg. 29.) It is both logical and reasonable to conclude that Congress had in mind the same total disability for which compensation was provided, the only added condition being that such disability be permanent. Pursuant to authority given in the Act of 1917, Treasury Decision 20, Regulation 11, was issued March 9, 1918, declaring in its first paragraph:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability."

Here the Treasurer and the Director made no distinction between total disability for compensation and insurance.

It is proper to assume that Congress knew the interpretation given its statutes by its administrative officers. With

this knowledge that total permanent disability for compensation and insurance were considered identical, Congress amended Section 302 of the Act of 1917, and provided:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month." (Act approved Dec. 24, 1919, 41 Stat. 373.)

With knowledge that the Bureau construed total permanent disability the same for compensation and insurance purposes, it is significant that Congress did not limit by express words the specific disabilities deemed total permanent disabilities to compensation. Congress having referred to the article on compensation in the insurance article, and the Bureau having defined them as identical, it was needless for Congress to repeat the specific disabilities in the insurance section. It is significant, too, that Congress in its amendatory act of 1919 used the identical phrase of the insurance section, to-wit: "total permanent disability," further showing it intended the same disabilities for compensation and insurance.

After this amendment, on November 26, 1920, the Director issued Regulation 57, quoted in the Appendix, pg. 29, expressly making the disabilities deemed by statute total permanent disabilities total permanent disabilities for both insurance and compensation. Later, on September 12, 1921, the Director issued Regulation 4, quoted in Appendix, pg. 30, which was in this particular substantially the same as Regulation 57 above mentioned.

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Law,* 299 Fed. 61, said, relative to interpretations of total permanent disability under war risk insurance:

> "Of course, no interpretation which is against reasonable common sense can be sustained. Nor can any be upheld which is in conflict with the declaration in the Amendment of December 24, 1919, 41 St. 373, 374, Sect. 302, being Comp. St. Ann. Supp. 1923, Sect. 514 (4), wherein Congress provided in effect that compensation shall be allowed if and while the disability is rated as total and permanent; provided, however, that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> *U. S.* v. *Law,* 299 Fed. 61, 64 (2). Decided May 12, 1924.

While it is true that *Law* v. *U. S.* was reversed by the Supreme Court on a jurisdictional question January 5, 1925 (266/494), it has been cited by other courts as authority on other questions. Nevertheless, it shows an appellate court's construction and application of 38 U. S. C. 473.

With this decision outstanding, and necessarily with knowledge of the interpretation put by the Bureau in its published regulations on Section 302, subdivision 3, of the War Risk Insurance Act, as amended, Congress re-enacted and amended Section 302 of the War Risk Insurance Act in the World War Veterans' Act, approved June 7, 1924, as Section 202, without limiting the statutory disabilities of subdivision 3 to compensation. Had Congress intended to make the disabilities deemed by it total permanent disabilities applicable only to the compensation sections, it is but reasonable to conclude that it would have used some such

expression as "for purposes of this section," or similar language, to note a limited application.

By Act approved March 4, 1925, Paragraphs 6, 7, 9 and 10 of Section 202 of the World War Veterans' Act was amended, but Paragraph 3 was not changed. By Act approved July 2, 1926, Section 202, Par. 3 of the World War Veterans' Act of 1924 was amended to add another disability to those deemed total permanent disability, but no change was made in the form or wording of the section to show that it was not applicable to insurance as construed by the courts and the Bureau.

Regulation 3140, providing that the loss of the use of one hand and one eye shall be deemed total permanent disability under yearly renewable term insurance, is substantially the same in that particular as Regulations 57 and 4, heretofore cited. The opinion of the Circuit Court of Appeals in this case gives the date of issuance of this regulation as March 24, 1932. We were advised by letter from the Veterans' Administration, dated April 25, 1934, and signed by James T. Brady, Acting Solicitor, that this regulation was first issued in May, 1930. See Appendix, pg. 32.

With knowledge of these regulations and the practice of the Bureau, Congress again, by Act approved July 3, 1930, amended the World War Veterans' Act. Section 202, subdivision 3, was amended, but the first paragraph in that subdivision, declaring certain disabilities total permanent disabilities, was re-enacted unchanged. Again Congress showed no dissatisfaction with the Director's interpretation of its statutes and purposes.

There is nothing in the many amendments to the War Risk Insurance Act and the World War Veterans' Act to show that Congress did not approve of the Bureau's interpretation of total permanent disability for insurance purposes. But to the contrary, Congress has further shown its

approval of the Bureau's interpretations of the Act and the regulations issued thereunder by having published, pursuant to Senate concurrent resolution 29, adopted June 27, 1932, a compilation of the Federal laws relating to veterans of wars of the United States, with explanatory notes and annotations. The compilation so published was furnished to the Senate pursuant to a resolution dated January 21, 1931, as follows:

> "Resolved, That the Administrator of Veterans' Affairs is requested to prepare and transmit to the Senate, in form suitable to be printed, a codification of all Federal laws relating to the veterans of our various wars, which codification shall contain (1) appropriate explanatory notes and annotations to each section of such codification and (2) suitable headings, reference tables, and indices, for the purpose of making available a clear and *complete statement of all the rights and privileges of such veterans.*" (Italics ours.)

On page 257 of this compilation designated Senate Document No. 131 appears provision 20 of the Government converted policy, making the same disabilities specified in Sect. 473, Title 38 U. S. C., total permanent disabilities under the insurance contract. And also on page 274 of this compilation is the following:

> "Statutory total permanent disabilities.—The statutory total permanent disabilities as included in subparagraph 3, Section 202, World War Veterans' Act, dealing with compensation, are here set forth as statutory total permanent disabilities for insurance (R. & P. 3122). (See also R. & P. 3140.)"

The resolutions above cited and quoted may be found on pages X, IX and XI of the compilation published by the Government Printing Office August 1, 1932, as Senate Document 131 and entitled "Federal Laws Relating to Veterans of Wars of the United States (Annotated)."

Two Circuit Courts of Appeals have definitely approved the application of 38 U. S. C. Sect. 473, to war risk insurance.

The Circuit Court of Appeals for the Ninth Circuit clearly considered Section 202, World War Veterans' Act (38 U. S. C. Sect. 473) applicable to war risk insurance:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work for short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans' Act, 1924, Sect. 202, as amended (38 U. S. C. A., Sect. 473), and its regulations. To be sure, he may not claim total disability merely upon the ground that he is no longer able to engage in farming, yet if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."
>
> *U. S.* v. *Rasar*, 45 F. (2d) 545, 548 (C. C. A. 9).

The same reiterated:

> *Sorvik* v. *U. S.*, 52 F. (2d) 406, 411 (C. C. A. 9).

See also:

U. S. v. *Law*, 299 Fed. 61, 64 (2).

The decision in *U. S.* v. *Cole*, 45 F. (2d) 339, is an inferential holding that Regulation 4 and Sect. 473, U. S. C. A., Title 38, are part of the war risk insurance contract, and the insured would be entitled to the total disability benefits if he had proved that he lost the sight of both eyes while the policy was in force.

Both compensation and insurance are provided for by the same Act. Both protect against total permanent disability. The Act nowhere undertakes to define total permanent disability other than in 38 U. S. C. 473. In the

absence of express restriction, it is to be assumed that the term "total permanent disability" is used throughout the statute in the sense first defined.

Rampanga Sugar Mills v. *Trinidad,* 279 U. S. 211, 73 L. Ed. 665 (2).

The foregoing legislative, judicial and administrative history of 38 U. S. C. Sect. 473, shows it was the intent of Congress that the instances of total permanent disability there specified should apply to war risk insurance.

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;

U. S. v. *Bailey,* 9 Peters, 238, 256, 11 Curtis 341, 345;

Swigart v. *Baker,* 229 U. S. 187;

U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898.

(2) Regulation 3140 Authorized and Binding on Government and Insured.

If 38 U. S. C. 473 is applicable to war risk insurance, it follows necessarily that Regulation 3140 is authorized.

Further, we submit that independently of whether Section 473, Title 38 U. S. C. is construed as within itself authorizing that total permanent disability under insurance contracts, as well as under compensation provisions, shall include the specific instances therein mentioned, Regulation 3140 and similar prior regulations are valid and within the broad powers of the Director of the Veterans' Bureau, now the Administrator of Veterans' Affairs, consistent with the act granting war risk insurance, and correctly interpret the purposes and intent of Congress.

House Report 130, 65th Congress, reporting on the bill that became the War Risk Insurance Act of 1917, shows that one of the controlling purposes of the War Risk Insurance Act was to afford the soldier the opportunity to carry insurance against death and permanent total dis-

ability on a parity with persons not engaged in war service, the rate to the soldier to be the peace-time rate, the Government to take care of the expense of the extra hazard of military service. Certainly, Congress intended that war risk insurance should be as liberal in its terms, conditions and provisions, and as protective in its scope, as any similar policies issued in civil life. We think this Court may take judicial notice of the fact that policies of insurance companies quite generally carry a provision making the loss of both feet, or both hands, or both eyes, or a hand and an eye, total permanent disability under the policy. Certainly, a regulation that affords equal protection and advantages is in accord with the purposes of Congress.

Another purpose of Congress in granting war risk insurance was to obviate the necessity for future pension legislation as had been enacted in the past.

We do not contend that the Director of the Veterans' Bureau can amend, modify or enlarge the statutes of Congress; but we do contend that it is the power and duty of the Director, now Administrator of Veterans' Affairs, to interpret the statutes, determine the purposes of Veterans' legislation, and supplement the statutes by regulations to make clear the purposes of such legislation and the rights and liabilities of the insured and the Government thereunder.

Relevant parts of Section 13 of the War Risk Insurance Act approved October 6, 1917, provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections

> five and four hundred and five. * * * The director shall adopt reasonable and proper rules * * * to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act * * *."

The relevant parts of Section 402 of the same Act of 1917 provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall determine upon and publish the full and exact terms and conditions of such contract of insurance * * * Provision for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *"

Under this authority Treasury Decision 20 W. R. was issued, interpreting total permanent disability for insurance and compensation the same. And later, under the same authority, Regulation 57 was issued, placing certain specific losses, including the permanent loss of the use of a hand and an eye, within the term "total permanent disability," both for compensation and insurance.

With knowledge of these regulations, by the Act approved August 9, 1921, Congress created the office of Director of the Veterans' Bureau, and thereby gave and transferred to him the same power and authority theretofore conferred on the Director of the Bureau of War Risk Insurance. Nothing in this Act shows any disapproval of the former Director's interpretation of the intent and purpose of Con-

gress given in the regulations issued. Thereafter the Director of the Veterans' Bureau issued Regulation 4, to the same effect as old Regulation 57.

With knowledge of the Bureau's regulations, Congress, in the World War Veterans' Act, reaffirmed its power to issue regulations in much the same language as the original Act, without showing the slightest disapproval of the regulations issued.

The relevant part of Section 5 of this Act of 1924 is as follows:

> "The director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV, of this Act, shall be conclusive except as otherwise provided herein. * * * The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act * * * "

By Act approved March 4, 1925, Section 301 of the World War Veterans' Act, 1924, was amended, and a provision of the original War Risk Insurance Act omitted from the Act of 1924 was inserted, to-wit:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage

> of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

No disapproval of the Bureau's regulations cited is shown here.

Congress again amended Sect. 301 of the World War Veterans' Act by Act approved June 2, 1926, but retained the provisions of that section inserted by the Amendment of March 4, 1925, above quoted, and showed no disapproval in this Amendment of the regulations theretofore issued; and again, by Act approved May 29, 1928, amended Sect. 301 of the World War Veterans' Act, and continued the powers theretofore given the Director without disapproval of the regulations issued.

The Director of the Veterans' Bureau then issued Regulation 3140, as we are advised, in May, 1930.

With knowledge of these regulations and the Bureau's interpretation of the laws granting insurance and the purposes of Congress, by Act approved July 3, 1930, Congress again amended the World War Veterans' Act, Section 5, prescribing the general powers of the director, to make his decisions on questions of law, as well as of fact, conclusive, except as otherwise provided in the Act. (See 38 U. S. C. A. 426, 1933 Cumulative Supplement.)

Likewise, by this same Act of July 3, 1930, Section 301, Paragraph 3, of the World War Veterans' Act was amended, but authority to make such other provisions from time to time, by regulation, for the protection and advantage of the insured, as may be found to be reasonable and practicable, was retained.

By another Act adopted the same date, July 3, 1930, the Veterans' Administration was provided for, and all the power and authority of the Director of the United States Veterans' Bureau was conferred and vested in the Admin-

istrator of Veterans' Affairs; and nothing is shown in this Act as disapproving the regulations of the Director.

Likewise, with knowledge of the Bureau's interpretation of the term "total permanent disability," contained in Sect. 400 of the War Risk Insurance Act of 1917, this general term was retained in Sect. 300 of the World War Veterans' Act, 1924, and the subsequent Acts of March 4, 1925, (43 Stat. at L. 1302, 1308); July 2, 1926, (44 Stat. at L. 790, 798); and May 29, 1928, (45 Stat. at L. 964, 967), amending and re-enacting this section without change or limitation to show disapproval of the Bureau's interpretation.

The Veterans' Bureau has interpreted and construed veteran legislation providing for insurance in accordance with the regulations here discussed for a period of nearly fourteen years. Clearly, the interpretations placed upon veteran legislation by the Director of the Veterans' Bureau, and the regulations issued pursuant thereto, have received legislative sanction and should not be overturned.

See:

United States v. *John Bailey*, 9 Peters 238, 256, 11 Curtis 341, 345;

Johnson v. *Manhattan R. Co.*, 289 U. S. 479, 500, 77 L. Ed. 1331, 1346;

National Lead Co. v. *U. S.*, 252 U. S. 140, 146, 64 L. Ed. 496, 499, 500.

See also decisions of this Court cited on page 20.

Authorized regulations relative to war risk insurance form part of the contract, and are binding on both the Government and the insured. They have the force of law and are binding on the courts.

White v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530;

U. S. v. *Cole*, 45 F. (2d) 339 (C. C. A. 6);

Ross v. *U. S.*, 49 F. (2d) 541 (C. C. A. 5);

Bartee v. *U. S.*, 60 F. (2d) 247 (1) (C. C. A. 6).

(3) Sufficiency of the Evidence.

The evidence and the fair inferences therefrom show:

Petitioner lost his right arm above the elbow on October 26, 1918, during which time his insurance was of force by payment of premiums. At the same time he had only one-tenth vision in his left eye and could see only the outline of large objects. His eye condition could not then be corrected. He had lost the use of his left eye. (See *Pan-American Life Insurance* v. *Terrell,* 29 F. (2d) 460 (C. C. A. 5), and cases there cited so holding.)

He was right-handed before he lost his right arm. He is not a highly educated man, having gone only as far as the third year in high school. He could not follow his former employment because of his disabilities. He gave up his training course on advertising because his health got bad. The jobs he procured were given him out of sympathy and were of a temporary nature, or given him on a commission basis, or on a basis the employer was to pay him whatever he might determine he was worth. The jobs to which there was any fixed remuneration attached he had to give up because of his disabilities. He has no talent for sales jobs and could not make anything at such work. He tried diligently to get other employment, but could not, in competition with others who had two hands and two good eyes. By his efforts over a period of years he was able to make only $405. The loss of an eye and an arm on opposite sides of the body is much more disabling than the loss of an eye and an arm on the same side of the body. Because of the difficulty of co-ordination between an eye and a hand on opposite sides, the medical witness testified, in his opinion petitioner was totally disabled.

Certainly this is substantial evidence to prove him totally disabled, which was the only issue in the case. Is there any better evidence that a man is unable to follow a substantially

gainful occupation than the proof that he tried various jobs and lost them because of his handicap? Can there be more definite proof that a man is unable to obtain employment in competition with others than diligent effort to obtain employment over a period of years and failure because of his disabilities? Is there more effective proof that a man is disabled to follow a gainful occupation than the proof of trial over a period of years resulting in the meager earnings of $405 in more than fourteen years? Is it not indulging in pure speculation in behalf of defendant for the court to say, under the evidence, that this man is able in spite of his disabilities to follow substantially gainful employment?

The ability to get employment, as well as the ability to do the required work after employment, is an important factor in determining whether one is totally disabled.

> "Evidence that insured suffered from recurrent skin disease, which rendered him unable, because of his appearance, to obtain employment, sustained finding of total permanent disability under war-risk policy."
>
> *United States* v. *Ranes*, 48 F. (2d) 582 (2).

> "Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of sound mind and average attainments under the usual conditions of life."
>
> *United States* v. *Cox*, 24 F. (2d) 944, 946.

This Court held in *Gunning* v. *Cooley*, 281 U. S. 90, in determining a motion of either party for a peremptory instruction, the court assumes that the evidence of the opposing party proved all that it may reasonably be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them, and that the credibility of witnesses and the weight to be given to their testimony are for the jury.

From an examination of the opinion of the Circuit Court of Appeals in this case it is apparent that the court did not draw, in favor of petitioner, all the inferences fairly deductible from the facts proven. The Circuit Court of Appeals apparently disregarded the eye disability and considered it of no handicap. The court was apparently determining the credibility of the witness rather than the fair inferences from the facts proven as to the disability resulting. The court apparently determined the weight to be given to the witnesses' testimony in the light of the circumstance that the eye had been defective from birth. However, we submit that the evidence does not show that the insured's eye was as totally defective at birth as it was at the time of his injury in October, 1918. This Court may take judicial notice of the fact that persons are not admitted to the Army when one eye is so defective, and from this it is presumable that petitioner's eye was not so defective even in 1917, when he enlisted.

Likewise, the Circuit Court of Appeals, in determining the effect of the eye deficiency, disregarded the medical testimony as to the increased difficulty of directing the work of a hand on the opposite side from the eye. Further, the Circuit Court of Appeals determined the credibility of petitioner's testimony that he tried diligently to get employment but could not in competition with others with two good hands and two good eyes as shown from the statement in the opinion: "Having no dependents and $90 a month compensation, he was under no necessity to work." There is no evidence in the record to show whether or not petitioner had dependents, and we are at a loss to understand how the Circuit Court of Appeals so concluded. As a matter of fact, petitioner was married and had a wife dependent on him.

The circumstance of long delay before bringing suit unexplained may, in some cases, affect the credibility of in-

sured's testimony; but this is a matter for the jury. To make it controlling would be to defeat by rule of evidence the limitation period fixed by Congress.

When it is remembered that in the case of yearly renewable insurance no policy was issued to the insured, and the average insured had little opportunity to know the law and practically no opportunity to know the regulations which constituted his policy, as these were not published in form available for the general public, it is not surprising that many veterans were ignorant of their rights for a long time and took no action to protect them. Certainly, Congress considered there were meritiorious claims that had not been presented and good reason for delay when it extended the time for making claim and bringing suit.

Pure ignorance of the contracts and the rights under them and the law no doubt accounts for many of the delays. Furthermore, is a man to be deprived of his rights, who is actually disabled, merely because he may believe he is not, and continues trying to work until all efforts and undertakings, one after another, fail and prove the error of such belief?

We submit that under the evidence in this case a jury could have properly found a verdict for petitioner, and that he has been deprived of his constitutional right of a jury trial.

Why Writ Should Issue.

The decision of the Circuit Court of Appeals in this case affects not only the rights of petitioner, but the rights of all persons holding contracts of Government (converted) insurance, and all persons who may have received any of the specific injuries mentioned in the statute and the regulation—the very character of injuries which Congress must have contemplated would be the probable fate of many of the soldiers in battle, and the very character of injuries

the soldier thought he was protecting himself against when he took the insurance.

The Acts of Congress make no distinction between total permanent disability under converted Government life insurance policies and total disability under yearly renewable term insurance; and the powers of the Bureau to declare the terms and conditions of the contract are the same relative to either form of insurance. To strike down this power and strike out the provisions protecting against specific losses in one case is to strike it from all contracts of insurance.

A man who has lost both eyes, or both legs, or both arms, but is otherwise in good health, could probably make no better proof than made in this case. He could show, as here, he tried to work, but that his handicaps defeated him; that he tried to get employment, but was pushed aside by the competition of able-bodied men suffering from no disability.

Other Circuit Courts of Appeals have taken a different view of the law than expressed by the Circuit Court of Appeals in this case.

A power of the Director of the Veterans' Bureau, exercised and acquiesced in for a long period of years, is now challenged.

We respectfully submit that this case presents Federal questions of great importance that should be settled by this Court, that thousands may know the value of their contracts and the Bureau may know how it shall deal with its maimed and dismembered insured veterans.

Respectfully submitted,

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

APPENDIX.

Section 400, War Risk Insurance Act of 1917.

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums hereinafter provided.

38 U. S. C. Sect. 473—Relevant part:

Disability resulting from injury; total and permanent disability; loss of both eyes; loss of use of both eyes and one or more limbs; tubercular ex-service men. If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: Provided, however, That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: Provided further, That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: Provided further, That for double total permanent disability the rate of compensation shall be $200 per month.

War Risk Regulation 57—Relevant parts:

IV. For compensation purposes a disability from injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz: "Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously any substantially gainful occupation and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

(c) When a presumption of total permanent disability is established under the following conditions: * * *

VII. Upon a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with provisions of Paragraph IV above. Such awards may be made retroactive to the date of the commencement of such total permanent disability if the case falls within the provisions of subparagraph (a) or (b) of Paragraph IV above, or to the date of the commencement of the period during which the person is presumed to be permanently and totally disabled if the case falls within subparagraph (c) of Paragraph IV above.

Awards of total permanent disability under the contract of converted insurance shall be governed by the terms and conditions of the converted policy.

IX. Regulation 54 is hereby revoked and all other bulletins, Treasury decisions, or regulations in conflict with this regulation are modified accordingly.

United States Veterans' Bureau Regulation No. 4, Division B:

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, "Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously a substantially gainful occupation, and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

VII. On a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with the provisions of Paragraph IV above. Such awards shall be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of said paragraph.

X. Bureau of War Risk Insurance Regulation 57 is hereby revoked and all other bulletins, Treasury decisions or regulations in conflict with this regulation are modified accordingly.

Regulation 3122:

Statutory total permanent disabilities. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after

the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Letter:

Washington, April 25, 1934.

In Reply Refer to: CC-A.

Mr. Jas. A. Lowrey, Jr.,
c/o Miller & Lowrey,
Attorneys at Law,
Macon, Georgia.

DEAR SIR:

Your letter dated April 13, 1934, addressed to Mr. E. Julian Peacock, Clerk, Committee on Naval Affairs, House of Representatives, Washington, D. C., relative to your desire to secure a compilation of the regulations of the Veterans' Administration, and if there is no such printed compilation, then requesting specific information relative to the effective date of Paragraph R-3140, Regulations and Procedure, Veterans' Administration, has been referred by Honorable Carl Vinson, House of Representatives, Washington, D. C., to this Administration for attention.

The Regulations and Procedure of the Veterans' Administration is a loose-leaf compilation consisting of sections pertaining to Adjudication, Adjusted Compensation, Finance, Supply, Insurance, Legal, Medical, etc. Only sufficient copies of this loose-leaf compilation were printed to meet the needs of the employees of the Veterans' Administration, except copies have been furnished to other Federal agencies and to accredited representatives of recognized veterans' and welfare organizations. This loose-leaf compilation is not published as a public document and cannot be purchased.

Paragraph 3140 of Regulations and Procedure was first incorporated in this loose-leaf compilation at the time it was originally prepared and when distributed in May 1930 was accompanied by a memorandum over the signature of the then Director of the United States Veterans' Bureau containing the statement: "This Insurance portion amends

and supersedes all other Regulations, General Orders, Circulars, and other instructions issued prior to March, 1930, as conflict therewith wholly or in part." The language that was incorporated in this Paragraph R-3140 was taken from the insurance policy contract.

Public No. 90, 65th Congress, approved October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been modified from time to time until these statutory permanent total disabilities are those listed in the paragraph above referred to. While said statutory permanent and total disabilities as contained in the law are with reference to the payment of compensation, the Veterans' Administration adopted the policy of making these same disabilities the basis of awarding insurance for permanent and total disability for both term insurance and converted insurance purposes. In the World War Veterans' Act, 1924, as amended, the provision for statutory permanent and total disabilities is contained in Section 202 (3). As stated above this provision first appeared in the Act of October 6, 1917, and has been amended by amendatory Acts dated June 25, 1918, August 6, 1919, December 24, 1919, June 7, 1924, and July 2, 1926.

It is noted you have a copy of Senate Document No. 131, 72nd Congress, 1st Session, "Federal Laws Relating to Veterans of Wars of the United States," already in your possession. On page 132 thereof under Section 463 you will find a historical note relative to Section 202 (3) of the World War Veterans' Act, 1924, as amended.

Yours very truly,

JAMES T. BRADY,
Acting Solicitor.